

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCTS \* Docket 00-MDL-1355-L  
LIABILITY LITIGATION \*  
\* New Orleans, Louisiana  
\*  
\* August 14, 2003, 9:00 a.m.  
\* \* \* \* \*

TRANSCRIPT OF STATUS CONFERENCE BEFORE THE  
HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Herman, Mathis, Casey,  
Kitchens & Gerel  
BY: RUSS M. HERMAN, ESQ.  
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New Orleans, Louisiana 70113

For the Defendants: Irwin Fritchie Urquhart  
& Moore  
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1                                    PROCEEDINGS

2                                    (August 14, 2003)

3                    THE DEPUTY CLERK: Everyone rise.

4                                    Be seated, please.

5                    THE COURT: Good morning. Call the case, please.

6                    THE DEPUTY CLERK: In Re: MDL 1355, Propulsid  
7 Products Liability Litigation.

8                    THE COURT: Counsel enter their appearances for the  
9 record.

10                   MR. IRWIN: Good morning, Your Honor. Jim Irwin for  
11 the defendants.

12                   MR. HERMAN: May it please the Court. Good morning,  
13 Your Honor. Russ Herman of Herman Mathis for the Plaintiffs'  
14 Liaison Counsel.

15                   THE COURT: We are here today for our monthly meeting  
16 of the plaintiff and defendant committees. I've been given a  
17 joint report of the agenda for the meeting. The first item on  
18 the agenda is "I. Update of Rolling Document Production and  
19 Electronic Document Production."

20                   MR. HERMAN: Your Honor, we will receive the  
21 corrected CD sometime within the next week. That's the  
22 outstanding issue right now. There are two other discovery  
23 issues later in the report, and I will take those up as we get  
24 to it.

25                   THE COURT: As I understand it, there's no further

1 scheduled document production other than the other areas later  
2 in the report?

3 MR. HERMAN: That is correct.

4 THE COURT: "II. State Liaison Counsel."

5 MR. ARSENAULT: Nothing new to report, Your Honor.

6 THE COURT: "III. Patient Profile Forms and  
7 Authorization."

8 MR. IRWIN: Your Honor, there are 208 outstanding at  
9 this point. We will be submitting a supplemental motion within  
10 the next 14 days with respect to those 208.

11 THE COURT: Let me have those and I will act on them  
12 in the same way. "IV. Service List of Attorneys."

13 MR. HERMAN: I believe Mr. Irwin has that new service  
14 list, Your Honor.

15 THE COURT: "V. Third Party Subpoena Duces Tecum."

16 MR. HERMAN: Your Honor, this is one of the ongoing  
17 discovery issues that I spoke about. Degge Group has submitted  
18 what we can best describe as, from our point of view, an  
19 unwarranted request for exorbitant copying and assembling  
20 expense. It is in the nature of a Rule 45 motion. We have  
21 opposed the motion and it needs to be set for hearing and  
22 disposition.

23 We would suggest, in fairness to the Degge  
24 Group, that it probably should be set coincident with our next  
25 report to the Court, assuming that the Court has time either to

1 hear that matter or dispose of it at that time.

2 THE COURT: I have the matter before me. It is  
3 submitted and I will be deciding that very shortly. I really  
4 don't need any further information on it. I have all of the  
5 information that was submitted to me. The Degge Group provided  
6 me with a letter and with documentation. I have your  
7 positions. I'm ready to rule on it and I will be doing so  
8 shortly. "VI. Motion on Class Certification."

9 MR. HERMAN: We have met on that issue. I will let  
10 Mr. Irwin address it first and then I will comment.

11 MR. IRWIN: Your Honor, we have furnished to the PLC  
12 a memorandum suggesting a schedule for the resolution of the  
13 remaining class certification issues and motion. That memo was  
14 not ripe for distribution to the Plaintiffs' Steering  
15 Committee. We understand it has not been circulated. Further,  
16 we are about to submit to the Plaintiffs' Steering Committee  
17 and Plaintiffs' Liaison Counsel a draft Pretrial Order that  
18 would have a specific schedule for them to look over for what  
19 we hope would be an agreed submission to Your Honor to present  
20 these remaining issues.

21 THE COURT: With regard to these remaining issues,  
22 how do you see it? We have got a number of state motions for  
23 class certification. Do I deal with them in globo or  
24 individually?

25 MR. IRWIN: The suggestion that we have penned and

1 passed on to the Plaintiffs' Liaison Counsel would be that you  
2 deal with them in globo; that they would be presented in a  
3 serial fashion, but you would generally take them up at the  
4 same time.

5 MR. HERMAN: I do have one comment on that. We have  
6 a team working on at least two certification petitions on what  
7 we believe are certifiable class issues. One is on redhibition  
8 under Louisiana law, and the other has to do with states that  
9 have similar laws which we believe can be grouped. As to the  
10 state class issues, once we get the memoranda or suggested  
11 Pretrial Order from the defendants, what we plan to do is to  
12 take the lead lawyer on each state class petition, ask them to  
13 meet with us here in New Orleans and ask them to prepare  
14 whatever portion of the certification hearing that applies to  
15 their state class. I believe that will give the putative class  
16 members in each state the best representation they can have  
17 rather than having a primarily Louisiana lawyer attempt to get  
18 a Wisconsin case cert'd before this Court.

19 THE COURT: Both of you see this Court making the  
20 decision on certification?

21 MR. IRWIN: We did research that and clearly you are  
22 authorized to do that.

23 MR. HERMAN: We certainly believe that you're  
24 authorized to do it, but more than that we believe that that is  
25 the best way to do it. Your Honor is familiar with this case.

1 To have to send these cases to judges who would have to start  
2 all over on issues just doesn't make a lot of sense to us.  
3 Now, there are some lawyers who would prefer to have these  
4 cases determined under the law of other federal circuits.

5 THE COURT: I understand. We are dealing next with  
6 "VII. Plaintiffs' and Defendants' Respective Requests for  
7 Production of Documents."

8 MR. HERMAN: I believe that we are supposed to get a  
9 response next week to the outstanding issues. The defendants  
10 haven't had a problem meeting the deadlines in which they tell  
11 us they are going to produce or respond. The admission request  
12 we are going to reduce in number, try to get down to a workable  
13 number, under 500 documents, then we are going to have a  
14 meeting and confer. Hopefully over a day's period we can  
15 narrow as to which documents don't meet the business records  
16 exception to the hearsay rule according to the defendants and  
17 then list the individuals who need to be 30(b)(6)'d so that we  
18 can get those documents either within the rule or it will be  
19 shown they are not within the rule. Basically, that issue is  
20 the chief discovery issue outstanding between plaintiffs and  
21 defendants.

22 THE COURT: That ought to be able to be reached in an  
23 easy fashion. Let's not spend a lot of resources on that. It  
24 seems to me either it is or isn't. There's not a lot of gray  
25 area. Both of you ought to be able to get together and go

1 through those documents and make some headway.

2 MR. HERMAN: Although it's not specifically listed,  
3 we've also discussed a stipulation that depositions taken in  
4 discovery in this case, both of fact witnesses and experts, may  
5 be used in any trial in any Propulsid case subject to the  
6 objections which are reserved, and that is by either party. We  
7 need to prepare that stipulation jointly and have that  
8 submitted to the Court so that we know which materials can form  
9 part of a trial package and which depositions will have to be  
10 taken over for perpetuation purposes.

11 THE COURT: If there are any rulings you need for me  
12 to make, I will make them. There are some rulings that maybe  
13 ought to go with the package to the states or to the districts  
14 from whence they came. If there are any rulings that you need  
15 from my standpoint, look at them closely and give them to me  
16 and I will make them so we will eliminate the work, hopefully,  
17 for the judges who are going to be getting these cases and also  
18 they may not 1404 them back here.

19 MR. HERMAN: Your Honor, with respect to "VIII.  
20 Trust Account," the State Liaison Counsel have a proposal to  
21 set forth how funds should be allocated as they are withdrawn.  
22 The PLC has a position that is different from that. Our  
23 suggestion is that both the State Liaison Counsel and the PLC  
24 submit at a date certain their positions to Your Honor under  
25 seal.

1 THE COURT: I've had that before me in the last  
2 conference. There was some disagreement, friendly though it  
3 be, regarding the trust account and the disbursement of funds  
4 in the trust account. I would like a letter or a brief from  
5 the State Liaison Counsel setting forth what they perceive is  
6 the problem and their suggested solution and I would have the  
7 PLC respond to it. How much time do you need?

8 MR. ARSENAULT: We could have that ready immediately,  
9 Your Honor. Several days. Five days.

10 THE COURT: Let's do it in ten days, and I will give  
11 the Plaintiffs' Liaison Counsel five days to respond. I will  
12 take it under submission.

13 MR. HERMAN: Those submissions would be under seal?

14 THE COURT: Yes. I'm not trying to stop any of the  
15 plaintiffs from seeing the matter. It's just that this has to  
16 do with certain work that was performed by each party, I  
17 suspect, certain costs and so forth. There may be work  
18 product, and the plaintiffs have a concern that it be under  
19 seal for that reason. I understand you will do so.

20 MR. HERMAN: We also don't want the defendants to be  
21 privy to our information.

22 THE COURT: I understand. That was implied in what I  
23 said.

24 MR. HERMAN: Thank you, Your Honor. With respect to  
25 mediation --



1 THE COURT: "IX. Declassified Documents," there is  
2 nothing to report, as I understand. "X. Mediation."

3 MR. HERMAN: We had mediation this week of 13 cases.  
4 Mr. Irwin and Mr. Preuss, for the defendants, and I can report  
5 that the offers submitted by Propulsid after back-and-forth  
6 negotiations are being, in process, transmitted to their  
7 clients and their referring counsel, and we expect to report  
8 back to Mr. Preuss within a week as to any acceptances of  
9 offers. Basically, that's the report.

10 THE COURT: Again, I urge both sides to look at this  
11 globally and see whether or not globally you can deal with it.  
12 If we are looking at 10 cases, 13 cases, 15 cases, or whatever,  
13 and we try to do a case-by-case analysis, that's not what the  
14 MDL is for. You are not utilizing the MDL's facility  
15 appropriately. The individual judges in the individual  
16 districts can deal with those problems one by one, case by  
17 case.

18 From an MDL standpoint, the opportunity that  
19 affords the litigants for both sides is the opportunity to look  
20 at the case globally and see whether all or any aspect of the  
21 case can be dealt with appropriately, from your clients'  
22 standpoint, globally and that's the advantage of the MDL. If  
23 you don't exercise that advantage, you might as well be back in  
24 the districts. I can't do much for you that districts cannot  
25 do for you in probably a better fashion, so I urge you to

1 continue to do that.

2 MR. HERMAN: With respect to the --

3 THE COURT: "XI. Trial Schedule."

4 MR. HERMAN: -- I hand it over to Mr. Irvin.

5 MR. IRWIN: As we discussed in our preparation  
6 session this morning, we are working towards the preparation of  
7 the seven cases. We have issued I couldn't count the number of  
8 subpoenas. We are presently preparing to issue 37 notices of  
9 deposition. I have been in touch with each plaintiff attorney  
10 and we have discussed the forecast of what needs to be done. I  
11 am authorized to report to the Court at least four of the  
12 plaintiff attorneys agree with me they would prefer not to have  
13 these trials set until January, considering the amount of work  
14 that needs to be done.

15 We would agree with Your Honor's comments this  
16 morning that motions with respect to these cases should be  
17 concluded -- planning for the motions in these cases should be  
18 concluded earlier rather than later. Were we to schedule these  
19 cases for trial in January, that would contemplate the  
20 submission and conclusion of motions no later than early  
21 December. We agree with that.

22 I think we also reported to Your Honor that we  
23 have had discussions with a couple of the plaintiff attorneys  
24 about ways in which to present accelerated motions for summary  
25 judgment in the appropriate cases, and we are making efforts to

1 plan on how to do that. Obviously, at the same time we will  
2 continue traditional trial preparations, but we will also look  
3 at streamline ways to present the issues more efficiently.

4 THE COURT: We have gathered some experience on the  
5 trial of these types of cases because we have tried some before  
6 in this litigation. Experience teaches us that when we are  
7 dealing with an MDL, there are depositions in which some  
8 portions of the depositions are inappropriate for particular  
9 cases and so those depositions need to be cleansed, framed, and  
10 organized a little bit differently to suit a particular case.  
11 It takes a little time to do that. Also, there's some motions  
12 that are peculiar to each particular case that is not general  
13 and has not been decided by the Court previously when it was  
14 viewed from an MDL context. We can't wait until the eleventh  
15 hour to deal with these issues.

16 Whatever the trial date is going to be, I want  
17 the motion practice finished, all of the logistical problems  
18 taken care of, so that we are not in the middle of the trial  
19 still working on dealing with logistical problems in connection  
20 with the depositions or other evidence. I'm going to set a  
21 status conference for all of the cases in open court. I'll  
22 advise all of the parties of the date of the status conference.  
23 Everybody will come in and I will talk to them about deadlines.

24 There was a suggestion made at the informal  
25 conference in advance of this hearing that the deadlines would

1 be set for all of the cases at the same time. I'm interested  
2 in discussing that, also, with the parties. I will pick a date  
3 in the next couple of weeks or a month and set a status  
4 conference and get everybody in court. Anything further on the  
5 trial schedule?

6 MR. HERMAN: Yes, Your Honor. With respect to the  
7 status conference that you set on individual cases, we'll  
8 attempt to have a member of the PSC for those conferences. We  
9 point out that the last time trials were set the PSC was  
10 requested to help organize materials, do deposition cuts,  
11 et cetera, et cetera, and was under a great deal of pressure in  
12 a short period of time to do that. The PSC does not look upon  
13 its obligation as to participate in individual trials. At that  
14 status conference, we would like to make it clear to the  
15 attorneys who are responsible for their own cases that the  
16 materials are available to them, but that that work has to be  
17 accomplished by them rather than by the PSC. I place those  
18 remarks on the record because I know that this record is  
19 distributed on the Internet, and we want to make it very clear  
20 that individual attorneys have responsibility for the  
21 individual cases.

22 THE COURT: That's the reason I want to meet with the  
23 individual attorneys, so that everybody understands what  
24 responsibilities they have henceforth. Some of the attorneys  
25 have been relying on the committee, as they have a right to

1 rely on the committee for the discovery aspect of the case, but  
2 it was the understanding of the Court that the committee did  
3 not have the responsibility to try each of the cases. The  
4 lawyers have to understand that and also understand what's  
5 available to them and what their responsibilities are at the  
6 outset so that the communication is clear and they know before  
7 they get ready for trial what they are going to have to do.

8 MR. HERMAN: In that regard, whatever date Your Honor  
9 sets for the status conference, we would like to have the  
10 stipulation as to the use or nonuse of particular depositions  
11 in place by that time.

12 THE COURT: Okay. "XII. Pharmacy Indemnity  
13 Agreements."

14 MR. HERMAN: We are being furnished those as  
15 Mr. Irwin receives them.

16 MR. IRWIN: That is correct, Your Honor.

17 THE COURT: "XIII. Endgame Planning Committee." The  
18 Court has appointed an Endgame Planning Committee for the  
19 purpose of bringing this litigation to a conclusion. We have  
20 been at it now for three years. Millions of documents have  
21 gone back and forth and a lot of discovery has taken place.  
22 It's in its waning period now, so we should be looking at the  
23 end of this interesting litigation. Anything further on the  
24 Endgame Planning Committee?

25 MR. HERMAN: No, Your Honor.

1 THE COURT: "XIV. Motions to Withdraw." No new  
2 motions to withdraw have been received since the June 26 status  
3 conference. As I understand, this item may be removed from the  
4 agenda. "XV. Donald and Loretta Anderson." Anything further?

5 MR. IRWIN: No, Your Honor.

6 THE COURT: That should be removed, also. New items.  
7 "XV. Motions to Enforce Subpoenas." There is an issue  
8 involving the Social Security Administration regarding certain  
9 documents. I ordered that the Social Security Administration  
10 appear and respond to those motions. The attorney has been  
11 selected by the United States Attorney's Office. They have  
12 contacted me, together with the defendants, and asked that some  
13 additional time be given to them so that they can respond to  
14 this. I understand they are interested and I am delighted they  
15 are willing to participate and cooperate by providing this  
16 information. I need the information to be provided. They need  
17 to understand that. It's a question of how it's given.

18 MR. IRWIN: Your Honor, I would add for purposes of  
19 the record, ordinarily we wouldn't feel a need to file such a  
20 motion, but given the fact that this is an MDL we are all under  
21 an obligation to move a large number of cases within prescribed  
22 deadlines. We conveyed that not only to the Social Security  
23 Administration, but to Rite Aid, as well, to try to help them  
24 understand the circumstances that we were working under. We  
25 issued a lot of subpoenas to a lot of healthcare providers. We

1 put some pressure on all of them to respond and they did  
2 respond, understanding the unique character of this litigation.

3 I hope that with respect to the Social Security  
4 Administration that we are talking with that we will be able to  
5 work this out. We have gotten a signed authorization in the  
6 Cangelosi case and that should satisfy the Social Security  
7 Administration. The remaining issue I'm going to have with  
8 them is they are going to say, "How long will it take for us to  
9 get the records?" We will have to see what date they can get  
10 them to us.

11 THE COURT: I set a status conference for 8-21-03 at  
12 3:30 with the Social Security Administration and interested  
13 parties, and I expect we will resolve those issues at that  
14 time. The next item on the agenda, "XVII. Global Application  
15 of Daubert," any comments on that?

16 MR. IRWIN: Like the class certification issues, we  
17 have submitted a memo to the Plaintiffs' Liaison Counsel  
18 setting forth some suggested procedures. We have also prepared  
19 and I think we will be able to deliver to their office today --  
20 certainly if not today, tomorrow -- a Pretrial Order that would  
21 provide for this same application. Obviously, it is something  
22 they would need time to consider further. We are a little  
23 farther along in the development of that Pretrial Order than we  
24 are with respect to the class certification one that I alluded  
25 to earlier. We will have that one to them today or tomorrow.

1 It would be our expectation that either we can agree or we not  
2 agree, but eventually there would be a Pretrial Order. The  
3 Court would consider the application of the Pretrial Order to  
4 this ruling and the appropriateness of its application  
5 litigation wide where the cases might apply.

6 MR. HERMAN: May it please the Court. I think it's  
7 safe to say we are going to oppose strenuously, vociferously,  
8 and tenaciously any application of Daubert on a class-wide  
9 basis. For one thing, for example, in Louisiana under  
10 Bourgeois the idea of medical monitoring is always open for  
11 additional testing procedures that may become acceptable in the  
12 medical community. Secondly, there's ongoing study of  
13 epidemiology, internal studies of J&J, et cetera, and the  
14 science is being developed. There are new journal articles  
15 being prepared and submitted. The rules on Daubert differ from  
16 circuit to circuit, federal court to federal court, and indeed  
17 some states don't even recognize Daubert. We think there are  
18 legitimate reasons for opposing any class-wide application on  
19 Daubert.

20 Daubert evidently has become a case in which  
21 plaintiffs are required to try their cases twice, and the PSC  
22 does not believe professionally it's appropriate for the PSC to  
23 determine the trial outcomes of these various cases without  
24 involving the lawyers in those cases in those issues. So  
25 whenever it's set, we expect that there will be a tenacious



1 opposition to any class-wide application of Daubert.

2 THE COURT: That's always been an interesting  
3 question, Daubert. Even the pronunciation is different in  
4 different parts of the country. The interesting thing is that  
5 Daubert is from here, but everybody is trying to convince him  
6 he has been mispronouncing it.

7 MR. HERMAN: We are going to learn how to pronounce  
8 it in Louisiana. Barry Nates, from Washington, has a son who  
9 has just been admitted to Tulane Law School, and I'm certain we  
10 will change it from French to Texas over the course of the next  
11 three years.

12 THE COURT: The issues are beginning to come up  
13 around the country. There's been some difference of opinion in  
14 various circuits regarding the role and timing of Daubert in  
15 class actions. See, e.g., Cari K. Dawson, *Combating Class*  
16 *Certification Experts: Potential Strategies for Defendants*,  
17 U.S. Law Week, Aug. 5, 2003, at 2051. First is the  
18 significance, if any, of Daubert in the class certification  
19 phase of the case and whether the Court should consider it at  
20 the class cert. hearing or whether that's a merits question to  
21 be reserved for trial. If it is to be considered at the class  
22 cert. phase, should the Court consider it in its full bloom  
23 state or just in its budding stage? Secondly, whether or not  
24 Daubert should be decided by this Court in the state cases,  
25 cases that have state beginnings, or whether the state courts

1 should be the ones to make those decisions. I do see a number  
2 of issues in that particular area. I don't know how I'm going  
3 to feel about it, but I will give the parties an opportunity to  
4 brief it. The next item is "XVIII. Bobby Joe Walton."

5 MR. HERMAN: Mr. Walton is institutionalized.

6 THE COURT: Is he a resident of a state?

7 MR. HERMAN: I believe he is a temporary resident of  
8 an institution in Texas. At any rate, we don't know of any  
9 individual claim he has filed. I believe I can speak for the  
10 defendants in that regard.

11 THE COURT: Those are the items I have on the agenda.  
12 One final note. My law clerk, Kevin McGlone, has completed his  
13 year of service. You have succeeded in exhausting him.  
14 Susan Bryson will be taking his position. Three law clerks  
15 have rendered yeoman's service on this case. Each one has told  
16 me it's been a high point in their career. All of you have  
17 been examples to them, and I appreciate the work and effort  
18 that you have put into the case and the opportunity that they  
19 have had to see very good lawyers handle their particular  
20 cases. Hopefully Ms. Bryson will be our last law clerk in this  
21 particular case and we will move on to other matters. The  
22 Court thanks Kevin for his excellent work on this matter.

23 MR. HERMAN: I speak for the lawyers in the case in  
24 wishing your outgoing clerk and your incoming clerk well. All  
25 of your staff and your clerks treat all lawyers with

1 professionalism and courtesy. They are always available to us  
2 and have made our job a great deal more enjoyable and a lot  
3 easier. I can say to you, truthfully, 30 years ago that  
4 federal law clerks felt they were more important than federal  
5 judges and conducted themselves as well. We appreciate very,  
6 very much the work effort, the intellect, and courtesies which  
7 you bring to the job and your staff, as well, Your Honor.  
8 Thank you.

9 MR. IRWIN: We share in those comments. The best of  
10 luck to you.

11 THE COURT: What's a good date for the next meeting?

12 THE DEPUTY CLERK: Thursday, September 25.

13 THE COURT: September 25 on a Thursday, how is that  
14 with your calendars?

15 MR. IRWIN: Yes, sir.

16 MR. HERMAN: That's fine, Your Honor.

17 THE COURT: Thursday, September 25, 9:00. Court will  
18 stand in recess.

19 THE DEPUTY CLERK: Everyone rise.

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CERTIFICATE

I, Toni Doyle Tusa, CCR, Official Court Reporter,  
United States District Court, Eastern District of Louisiana, do  
hereby certify that the foregoing is a true and correct  
transcript, to the best of my ability and understanding, from  
the record of the proceedings in the above-entitled and  
numbered matter.

*Toni Doyle Tusa*  
\_\_\_\_\_  
Toni Doyle Tusa, CCR  
Official Court Reporter